

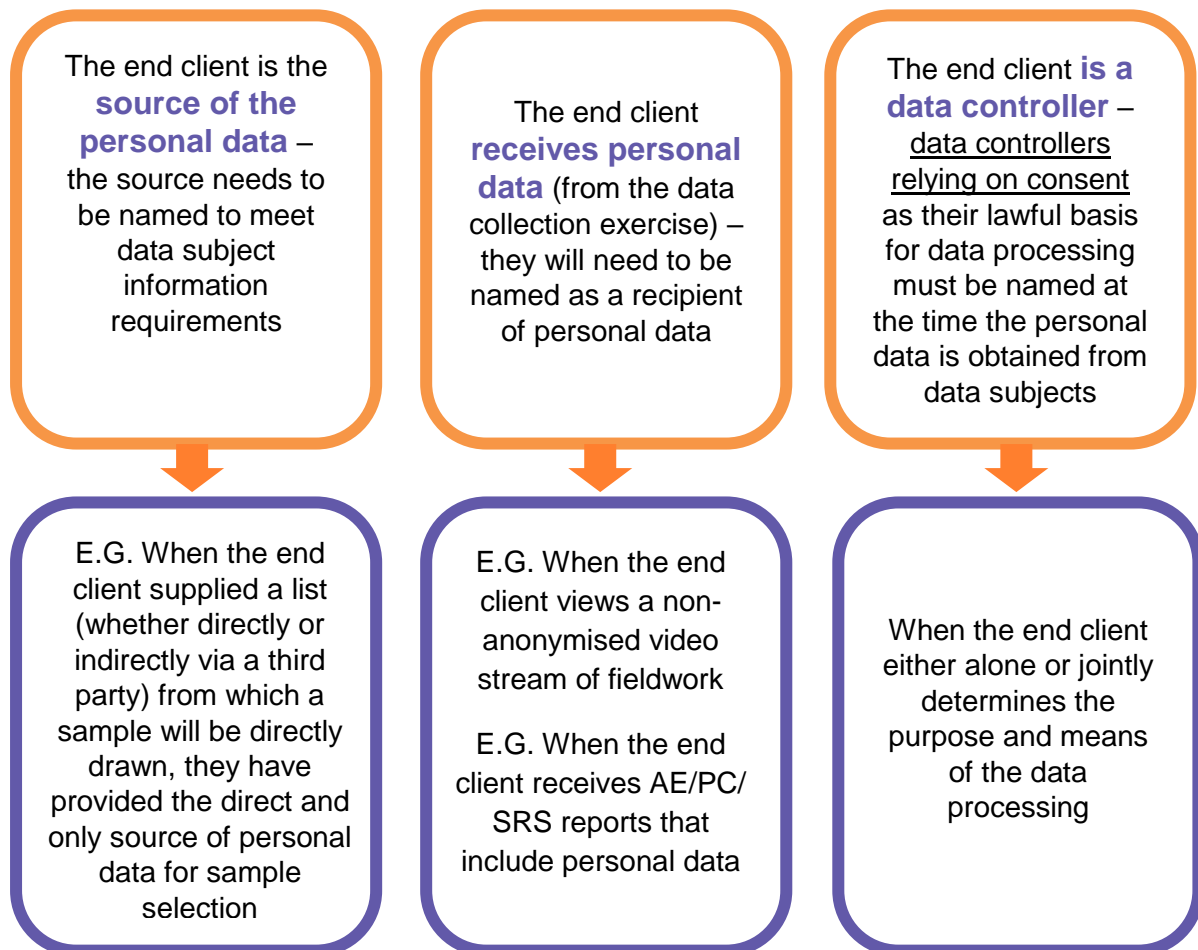
Data Protection Update – Naming the End Client February 2021

This update aims to explain clearly and simply the circumstances in which an end client needs to be identified to market research participants.

Key Points

There are three independent circumstances in which a commissioning end client would need to be identified to a respondent/data subject.

These are:



If ONE or more of these three circumstances is the case, then the end client MUST be identified to market research participants/data subjects.

Determination of roles

The determination of who is a data controller, joint controller, data processor or other party within the market research chain is a question of fact rather than contractual stipulation. It is dictated by the role of each party with regard to determining the purposes and means of the processing: basically, roles reflect the level of decision-making power exercised.

There may be occasions when the decision must be made whether to name the end client as a data controller on a 'just in case' basis. For example, when the end client receives AE/PC/ SRS reports that include personal data it may not be possible to predict that this is going to happen in advance of or during fieldwork e.g. if they occur in response to an open ended question within an online self-completion survey.

The BHBIA cannot advise members whether they are data controllers or data processors, we can only provide as much relevant guidance as we can, Whatever decision is made by those organisations involved in the data processing must be agreed jointly by the end client and the agency before projects begin and the rationale documented.

Draft EDPB guidance

In September 2020 the European Data Protection Board (EDPB) published their long-awaited draft 'Guidelines (07/2020) on the concepts of controller and processor in the GDPR'. Although not yet finalised the draft guidance includes some helpful clarifications, these include:

- *“the controller is the actor who has determined why the processing is taking place (i.e., “to what end”; or “what for”) and how this objective shall be reached (i.e. which means shall be employed to attain the objective)”*
- *“It is not necessary that the controller actually has access to the data that is being processed to be qualified as a controller”*
- *“As regards the determination of means, a distinction can be made between essential and non-essential means.*
- *“Essential means” are closely linked to the purpose and the scope of the processing e.g.*
 - *type of personal data which are processed (“which data shall be processed?”)*
 - *duration of the processing (“for how long shall they be processed?”)*
 - *categories of recipients (“who shall have access to them?”)*
 - *categories of data subjects (“whose personal data are being processed?”)*
- *“Nonessential means” concern more practical aspects of implementation e.g.*
 - *choice for a particular type of hard- or software*
 - *detailed security measures*

which may be left to the processor to decide on.”
- *“The controller’s instructions may still leave a certain degree of discretion about how to best serve the controller’s interests, allowing the processor to choose the most suitable technical and organisational means.”*

Joint sources, recipients or data controllers

There may be circumstances when two (or more) organisations are sourcing personal data, receiving it or acting together as data controllers.

Multiple organisations sourcing personal data

If more than one organisation is the source of an individual's personal data, each organisation must be named.

Example - If a pharmaceutical company supplied a list of names to be matched with a panel held by a fieldwork agency, the pharmaceutical company may be the data controller for their in-house database (from which the list of names they supplied was drawn), the fieldwork agency is the data controller for their panel but the two organisations are likely to be joint sources for the matched list. Whilst both sources have to be identified as the source of the list/personal data, only the fieldwork agency will be in direct contact with the data subjects and so they should be responsible for facilitating data subjects' rights and this should be made clear. Choosing not to name both sources would carry some risk. Of course, this point may be academic if the end client needs to be named because one of the other circumstances applies too.

The more conservative interpretation of requirements affecting the example above would suggest that the list resulting from the match is a result of two lists – the original and the panel – and so there are two sources for the matched list (after all it couldn't exist without either one of the two original sources) and so in data protection terms the matched list has two sources – the organisation that supplied the original list and the organisation that provided the panel. A more pragmatic interpretation might suggest that the producer of the merged list i.e. the panel provider is the sole source but this latter approach may carry some risk.

Multiple organisations receiving personal data

When it is practical to identify the organisations receiving personal data then they must be named. For example, if there are lots of organisations to be named it may not be practical to name them all but this is unlikely to be the case within the work that we do.

Joint data controllers

Organisations jointly determining the purpose and means will be considered joint controllers even if the balance of responsibility when determining purpose and means differs significantly between the two controllers. In this situation both joint controllers must be named irrespective of whether each controller directly processes personal data or not.

Example (taken from the MRS's 'Data Protection & Research Guidance Note on Controllers and Processors, 2018):

A client commissions market research. An agency determines sample sizes, interview methods and presentation of results. Client determines the general purpose and specific objectives of research exercise but agency decides what questions to ask, how to carry out the processing by survey, which individuals to select for interview, what form the interview should take, what information to collect from customers and how to present the results. Both parties are involved in determining purposes and means and agency has a high margin of manoeuvre. If no other organisation is instructed in processing of the data there will not be a data processor in the relationship.

When to name the end client

If naming the end client before the interview would undermine the integrity of the work, this may be done at the end of the interview BUT:

- Respondents must be made aware at recruitment that:
 - the client will be named at the end of the interview
 - they can withdraw their consent to participate at any point
- The justification for this should be documented

HOWEVER the end client receiving personal data MUST be named BEFORE any transfer takes place. So if viewing of non-anonymised film footage is live, the end client must be named before fieldwork takes place.

Not just a UK requirement

It is important to remember that the requirement to name the end client (when they are a data controller, source or recipient of personal data) is not just a UK requirement. This obligation exists wherever the terms of the General Data Protection Regulation (GDPR) apply.

Some examples

Overleaf there are a series of four examples that illustrate the likely data processing roles of key parties in the primary market research chain. PLEASE NOTE: THESE ARE SIMPLE EXAMPLES TO HELP ILLUSTRATE THE GUIDANCE, THE CONTENT IS NOT INTENDED TO PROVIDE A DEFINITION OF THE ROLES.

Example 1 A pharma company commissions a market research (MR) agency to carry out quantitative MR online. The MR agency will design the materials but commissions a fieldwork agency to script the study and recruit participants exclusively from its panel.

Example 2 A pharma company commissions a MR agency to carry out qualitative MR. The MR agency will design the materials with input from the client and moderate/transcribe the IDIs, but they will commission a fieldwork agency to recruit participants. The fieldwork agency will conduct ad hoc (custom) recruitment to fill the sample.

Example 3 A pharma company commissions a MR agency to carry out quantitative MR online. The MR agency will design the materials but commissions a fieldwork agency to script the study and recruit participants. Participants will be recruited in part from existing panellists of the fieldwork agency and in part via custom recruitment.

Example 4 A pharma company commissions an MR agency to carry out qualitative MR. The MR agency will design the materials with input from the client and moderate/transcribe the IDIs, but they will commission a fieldwork agency to custom recruit participants. The fieldwork agency also wants to secure the consent of participants to take part in future MR activities (potentially for a different client).

Some examples N.B. THESE ARE SIMPLE EXAMPLES TO HELP ILLUSTRATE THE GUIDANCE, THE CONTENT IS NOT INTENDED TO PROVIDE A DEFINITION OF THE ROLES.

Example 1

Pharma Company A commissions Market Research Agency X to conduct a quantitative piece of UK market research (MR), running an online survey with a sample of n=100 cardiologists. The MRA will design the MR materials, including the screener and questionnaire, and commission Fieldwork Agency 1 to script the study and recruit participants to the MR. The study will be fielded exclusively amongst the existing panellists of Fieldwork Agency 1.

- Pharma Company A is likely to be a **Data Controller** in relation to the MR activity because the processing will occur to serve their end purpose and because they are involved in determining the means (here, the sample).
- Market Research Agency X is also likely to be a **Data Controller** in relation to the MR activity because they are designing the MR materials, the “means”, needed to answer the business insight question of their client and within their proposal helped shape the purpose.
- Fieldwork Agency 1 is likely to be a **Data Processor** in relation to the MR activity because they will administer the MR instrument strictly according to the instructions of the MRA.
- Fieldwork Agency 1 is also likely to be a **Data Controller** in relation to the personal data of participants because they controlled the data of their panellists prior to the MR activity and will determine how the personal data of their panellists will be used, jointly with the MRA, for the purpose of the MR study.

Example 2

Pharma Company B commissions Market Research Agency Y to conduct MR in the UK that provides varying perspectives and meets specific and detailed objectives which will require an in depth understanding of a specific disease. The MRA suggests a series of IDIs with 12 specialists, 10 patients and 10 carers. The MRA will write the screeners, discussion guides and moderate/transcribe the IDIs, the pharma company will input to the screeners and the guides. The MRA will commission Fieldwork Agency 2 to recruit participants to the MR as they are unable to do this piece of the work themselves. Fieldwork Agency 2 will conduct ad hoc recruitment to achieve the necessary sample.

- Pharma Company B is likely to be a **Data Controller** in relation to the MR activity because the processing will occur to serve their end purpose and because they are involved in determining the means (by directing the information collection with detailed objectives and inputting to the screeners and guides, they will be involved in determining the data processing means)
- Market Research Agency Y is also likely to be a **Data Controller** in relation to the MR activity because they are designing the MR materials needed to answer the business insight question of their client and within their proposal helped shape the purpose. Receipt of personal data is a further reason to name them, but does not imply controllership.

- **Fieldwork Agency 2** is likely to be a **Data Processor** in relation to the MR activity because they will administer the MR instrument strictly according to the instructions of the MR Agency.
- **Fieldwork Agency 2** is also likely to be a **Data Processor** in relation to the personal data of participants because the entire data processing activity is governed by the requirements of the MR Agency and they did not control the data prior the MR activity.

Example 3

Pharma Company A commissions **Market Research Agency X** to conduct a **quantitative** piece of UK market research (MR), running an online survey with a sample of n=100 cardiologists. The MRA will design the MR materials, including the screener and questionnaire, and commission **Fieldwork Agency 1** to script the study and recruit participants to the MR. Participants will be recruited in part from existing panellists of **Fieldwork Agency 1** and in part through custom recruitment carried out by **Fieldwork Agency 1**.

- **Pharma Company A** is likely to be a **Data Controller** in relation to the MR activity because the processing will occur to serve their end purpose and because they are involved in determining the means (here, the sample).
- **Market Research Agency X** is also likely to be a **Data Controller** in relation to the MR activity because they are designing the MR materials, the “means”, needed to answer the business insight question of their client and within their proposal helped shape the purpose.
- **Fieldwork Agency 1** is likely to be a **Data Processor** in relation to the MR activity because they will administer the MR instrument strictly according to the instructions of the MRA.
- **Fieldwork Agency 1** is also likely to be a **Data Controller** in relation to the personal data of panellists because they controlled the data of their panellists prior to the MR activity and will determine how the personal data of their panellists will be used, jointly with the MRA, for the purpose of the MR study.
- **Fieldwork Agency 1** is likely to be a **Data Processor** in relation to the personal data of non-panellists (i.e. those custom recruited) because this data processing activity (the custom recruitment) is governed by the requirements of the MR Agency and they did not control the data prior the MR activity.

Example 4

Pharma Company B commissions **Market Research Agency Y** to conduct MR in the UK that provides varying perspectives and meets specific and detailed objectives which will require an in depth understanding of a specific disease. The MRA suggests a series of IDIs with 12 specialists, 10 patients and 10 carers. The MRA will write the screeners, discussion guides and moderate/transcribe the IDIs, the pharma company will input to the screeners and the guides. The MRA will commission **Fieldwork Agency 2** to recruit participants to the MR as they are unable to do this piece of the work themselves. **Fieldwork Agency 2** will conduct ad hoc recruitment to achieve the necessary sample. In addition, **Fieldwork Agency 2** is keen to secure the additional and separate consent of participants they recruit as part of this MR activity to take part in future MR activities relevant to their professional experience (but potentially for a different client).

- The roles in relation to the MR activity and the personal data being processed in relation to this MR activity remain unchanged from example 2.
- However, if **Fieldwork Agency 2** would like to embed a 'further consent' question to the study to retain the recruits for future MR, this is compatible but:
 - It is a completely separate data processing activity and roles will need to be set accordingly—it is likely that **Fieldwork Agency 2** will become a **Data Controller** of the recruits' personal data for the purpose of future MR; this is subject to its own requirements under the GDPR and distinction between this further activity and the initial processing, relating to the MR project, **must** be made clear.
 - From an ethical standpoint, any further processing occurring as a result of the MR activity is something the client must be aware and approve of, whether or not it has commercial implications.

Further updates

When there is further guidance from the European Data Protection Board or the ICO upon interpretation of the definition of data controller we will update members. The BHBIA continues to work with the MRS, the ICO on this issue and is liaising with our European counterparts EFAMRO, EphMRA and ESOMAR too. In view of the ongoing discussions on this issue members should be aware that advice on this point is subject to change so should look out for further guidance.

Appendix

A data controller is defined by the GDPR and DPA 2018 as the:

“natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data;”

Article 13 of the GBPR states that:

“Information to be provided where personal data are collected from the data subject

1. Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:

(a) the identity and the contact details of the controller and, where applicable, of the controller's representative;”

(e) the recipients or categories of recipients of the personal data, if any;

Article 14 of the GBPR states that:

“Information to be provided where personal data have not been obtained from the data subject

1. Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:

(e) the recipients or categories of recipients of the personal data, if any;

(f) from which source the personal data originate, and if applicable, whether it came from publicly accessible sources;

Further sources

BHBIA Latest Update on Naming End Clients as Data Controllers

<https://www.bhbia.org.uk/guidelines-and-legislation/privacy-data/latest-update-on-naming-end-clients-as-data-controllers>

ICO Guide to the GDPR, Key Definitions, Controllers and processors

<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/controllers-and-processors/>

MRS Data Protection & Research: Guidance Note on Controllers and Processors June 2018

https://www.mrs.org.uk/pdf/MRS_GDPRguidance_controllers_0618%20Final.pdf

Data Protection & Research: Guidance for MRS Members and Company Partners 2018 Part 1 (v0418)

https://www.mrs.org.uk/pdf/MRS%20Data%20Protection%20and%20Research%20Guidance%20Section%201%20_28.04.2018.pdf

DRAFT EDPB Guidelines (07/2020) on the concepts of controller and processor in the GDPR

https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2020/guidelines-072020-concepts-controller-and-processor_en

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